SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1202

W. D. HADEN COMPANY,

Petitioner,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. P. Hamblen,
Counsel for Petitioner.

INDEX

Subject Index

Cases Cited

STATUTES CITED

MISCELLANEOUS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1202

W. D. HADEN COMPANY,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now Comes W. D. Haden Company, a Texas corporation, and prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review its order, entered January 18, 1946, which reversed the judgment of the United States District Court for the Southern District of Texas, entered November 16, 1945, wherein respondent's application for injunction was denied,

and in support thereof would respectfully show unto the court:

Opinion Below

The opinion of the Court below appears on page 108 of the Record and is reported in 153 Fed. (2d) 196.

Brief Statement of Matter Involved

The petitioner, one of the large oyster shell distributors in the Texas and Louisiana Gulf coastal areas, operates dredge boats in Galveston Bay and other waters of the Gulf of Mexico, where shell is taken from the sea and transported to distributing plants by means of tugboats and barges. The employees on such dredge-boats live aboard them, eating and sleeping thereon. Although there are two (2) crews aboard, the employees sometimes all work for long hours, and at other times they are all idle for long hours, awaiting empty barges whose arrival at the dredge are governed by numerous circumstances including tides, etc. The employees receive shore leave for six (6) days out of each month, going ashore and returning therefrom by means of motor boats.

The respondent herein applied to the district court for an injunction to compel petitioner to keep the records and pay the wages required by the Fair Labor Standards Act as to its employees on its dredges. The trial court held that such employees are "seamen" and, therefore, exempt under Section 12 (a)(3) of the Fair Labor Standards Act. The Fifth Circuit Court of Appeals reversed and remanded this cause under the theory that, while such employees are "seamen," they are not "employed as seamen" within the meaning of the Act.

Jurisdiction

The jurisdiction of this court is invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925, C. 229, Sec. 1 (28 U. S. C. Section 347 (a), 43 Stat. 938). The date of the order by the Circuit Court of Appeals for the Fifth Circuit Court of Appeals for the Fifth Circuit to be reviewed is January 18, 1946. A petition for rehearing was denied February 18, 1946.

The question involved is an important question of Federal Law, and, not having previously been decided by the Supreme Court, is one as to which certiorari should be granted, since the interpretation of this exemption under the Act affects large numbers of employers and employees in coastal and river areas of the United States.

In addition, there is now existing a conflict of Federal authorities on the applicability of the term "seamen" to dredge employees.

Question Presented

The only question presented to this court is the proper construction of the phrase "employed as seamen" under the Act, i.e., whether the Circuit Court correctly construed the meaning of the exemption by declaring that such class of employees, although "seamen," were not "employed as seamen."

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fifth Circuit in the case numbered and entitled on its docket, No. 11302, L. Metcalfe Walling, Administrator of the Wage and Hour

Division, U. S. Department of Labor, Appellant, vs. W. D. Haden Company, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Fifth Circuit be reversed by the court and for such other relief as to this court may seem proper.

W. D. HADEN COMPANY,
By W. P. HAMBLEN,
Counsel for Petitioner.

Houston, Texas, May 4th, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1202

W. D. HADEN COMPANY,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The prior decisions of the Circuit Court of Appeals as to the interpretation of the exemption contained in Section 13 (a)(3) of the Fair Labor Standards Act of 1938 have been solely based on whether or not such employees were seamen within the ordinary meaning of the term and there are conflicts by such courts which have never been settled by the Supreme Court, although prior to the enactment of the Act there were no such conflicts.

Dredge employees were held to be "seamen" in every adjudicated case prior to the enactment of the Fair Labor Standards Act of 1938, wherein the courts were interpreting

the word "seamen" as it applied to other statutes. The Supreme Court held that dredge employees were seamen under the Eight Hour Day Act;[1] dredge employees were held to be entitled to a seaman's lien by virtue of their status as seamen; an engineer on a dredge,[2] pipemen on dredges,[3] deckhands,[4] scowmen and cooks on dredges,[5] dipper tenders,[6] here all held to be entitled to seamen's liens; in a later case a deckhand on a dredge was held to be a seaman within the meaning of the Merchant Marine Act and Longshoremen's Compensation Act,[7] and a deckhand on a dredge was to be a seaman within the meaning of the Jones Act;[8] dredge employees were held to be entitled to Maritime liens where the company was in bankruptcy.[9] Dredge-boats have been held to be subject to documentation under the laws of the United States and licensed to engage in coastal trade.[10] They have been held to be subject to inspection by the Bureau of Marine Inspection and Navigation.[11] A breach of discipline aboard a dredge is mutiny.[12]

---

[1] *Ellis* v. *United States*, 206 U. S. 246.

[2] *The Atlantic*, 53 Fed. 607 (D. S. C.).

[3] *McRae* v. *Bowers Dredging Co.*, 86 Fed. 344 (D. Wash.).

[4] *Saylor* v. *Taylor*, 77 Fed. 476 (C. C. A. 4).

[5] *Supra* (4).

[6] *The Hurricane*, 2 Fed. (2d) 70 (E. D. Penn.).

[7] *Kibadeaux* v. *Standard Dredging Co.*, 81 Fed. (2d) 670 (C. C. A. 5), certiorari denied 299 U. S. 549.

[8] *Pariser* v. *City of New York*, 146 Fed. (2d) 431 (C. C. A. 2).

[9] *Butler* v. *Ellis*, 45 Fed. (2d) 591 (C. C. A. 4).

[10] *In re Penglase Sand and Gravel Co.*, 76 Fed. (2d) 593 (C. C. A. 7).

[11] *Supra*.

[12] *In the Matter of United Dredging Company* and *Inland Boatmen's Division, National Maritime Union*, Case No. C-1432 of the National Labor Relations Board, and Case No. 10085 of the docket of this Court following *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, 62 S. Ct. 886.

Time and again the Federal Courts have held that dredge workers are seamen [13] and that dredges are vessels.[14]

Even after the enactment of the Fair Labor Standards Act, there seems to be no question but that dredge employees were seamen. An early interpretative bulletin issued by the Wage and Hour Department construed them as seamen.[15] One of the first cases reported by the Courts on the interpretation of this question under the Fair Labor Standards Act held that barge-tenders were seamen.[16] Following this decision, it was held by a Federal District Court in Massachusetts that a deckhand on a dredge was a seaman within the meaning of the Fair Labor Standards Act.[17]

It was not until April, 1945, that the Federal Courts reported a contrary holding. In the case of *Anderson* v. *Manhattan Lighterage Corporation*,[18] decided by the Second Circuit, the judgment of the District Court holding that lighter captains were seamen was disapproved and

---

[13] *Saylor* v. *Taylor*, 77 Fed. (2d) 476 (C. C. A. 4).
The Hurricane, 2 Fed. (2d) 70 (D. C. Penna.), affirmed 9 Fed. (2d) 396 (C. C. A. 3).
Ellis v. *United States* (see note (1) *supra*).
Kibadeau v. *Standard Dredging Co.* (see note (7) *supra*).
Maryland Casualty Co. v. *Lawson*, 94 Fed. (2d) 190 (C. C. A. 5).

[14] *City of Los Angeles* v. *United Dredging Co.*, 14 Fed. (2d) 364 (C. C. A. 9), cited with approval by the Supreme Court of the United States in *Norton* v. *Warner*, 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931.
The International, 89 Fed. 484 (C. C. A. 3).
The Starbuck, 61 Fed. 502 (D. C. Penna.).
The Atlantic, 53 Fed. 607 (D. C. S. C.).
Butler v. *Ellis*, 45 Fed. (2d) 951.
The Dredge Alabama, 19 Fed. 544 (D. C. Ala.).

[15] Wage and Hour Release No. R-899, issued July 12, 1940.

[16] *Gale, et al.* v. *Union Bag and Paper Corp.*, 116 Fed. (2d) 27 (C. C. A. 5), writ refused 313 U. S. 559, 61 S. Ct. 837.

[17] *Bolan* v. *Bay State Dredging and Construction Co.*, 48 FS 266 (D. C. Mass.)

[18] 148 Fed. (2d) 971 (C. C. A. 2), cert. den. 66 S. Ct. 27.

thus first began the reversal of policy as far as the construction of the word "seamen" is concerned. The decision in the *Anderson* case was shortly followed by a decision of the Seventh Circuit in the case of *Walling, Administrator,* v. *Great Lakes Dredge and Dock Company,*[19] wherein dredge employees were held not to be seamen and, therefore, within the coverage of the Fair Labor Standards Act of 1938. This case was followed by the opinion of the First Circuit in the case of *Bay State Dredging and Contracting Company* v. *Walling, Administrator,*[20] holding that dredging employees were not seamen within the meaning of the Act.

It is, therefore, relatively evident that there is now existing a conflict within the various Circuit Courts of Civil Appeal as to the proper construction of the term "seamen" as used in the Fair Labor Standards Act of 1938. The courts in construing the term in the three (3) latter cases above mentioned have stated that the term must be construed in its ordinary meaning and the Circuit Court of Appeals in the instant case so stated,[21] yet such courts have disregarded the ordinary meaning of the term as established by all of the prior decisions of the Supreme Court and Circuit Courts of Appeals.

Even now, there exists a conflict within the executive departments of the Government on this particular question. The Treasury Department, in its interpretative bulletin, issued January 17, 1946, by the Office of Commissioner of Internal Revenue (A & C, Coll. No. 5976), has ruled that employees on dredge-boats are "members of the crew of a vessel" in interpreting the exemption contained in Social Security Act (Sec. 811 (b)(5)), and the Internal Revenue

---

[19] 149 Fed. (2d) 9 (C. C. A. 7).

[20] 149 Fed. (2d) 346 (C. C. A. 1).

[21] Record, p. 113.

Code (Sec. 1426 (b)(5)). This interpretation is in direct conflict with the interpretation of such similar exemption in the Fair Labor Standards Act of 1938 by the Labor Department, under consideration herein.

The result obviously has been the creation of a state of confusion among employers and employees engaged in dredging activities, which confusion will not be abrogated until the Supreme Court speaks upon such question.

Point II

The Circuit Court of Appeals for the Fifth Circuit in its opinion in the instant case established a theory on the interpretation of the exemption contained in Section 13 (a) (3) of the Fair Labor Standards Act of 1938, which has never heretofore been advanced by this Court or any Circuit Court of Appeals and which establishes a rule of Federal law tending to further confuse the issue as to such exemption and contrary to prior decisions of this Court and other Circuit Courts of Appeal.

In its opinion the Circuit Court of Appeals stated:

> "If the exemption were of all seamen, we should be inclined to hold as did the District Court, that these men are seamen." [22]

The court then proceeds to contend that, notwithstanding such opinion, the dredge-boat employees are not "employees employed as seamen" within the terms of the Act, on the theory that such words "are not mere tautology." [23] This presents a theory never before advanced in the construction of the term seamen in this Act or any other Act. This theory was not advanced by the Wage and Hour Division of the Department of Labor, appellant in the case below,

---

[22] Record, p. 113.

[23] Record, p. 114.

nor was such interpretation ever argued to either the District Court or the Circuit Court of Appeals. To say in one breath that a certain category of employees are seamen by virtue of the work they do, and in the next breath to say that they are not "employed as seamen" is, we feel, a conflict within itself, which will have the effect of further confusing the issue before the applicable employers and employees involved.

The vast number of industries in the coastal and river areas of the United States that are subject to the applicable provisions of this Act, as they particularly pertain to the exemption under consideration, are consequently placed in an even more precarious position as to the method of proceeding under such Act. The courts have never before had before them a case involving employees who dredge for oyster shell on the Gulf Coast, although the industry is a vastly important one in the economic life of the states surrounding the Gulf of Mexico. The fact that a great number of individuals is so affected warrants this court in taking jurisdiction of the matter to the end that the question involved may be ruled upon by the highest tribunal of this land to forever establish a rule of law to guide affected parties and prevent undue litigation.

Respectfully submitted,

W. P. Hamblen,
Counsel for Petitioner.

INDEX

CITATIONS

696530—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1202

W. D. HADEN COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the district court (R. 100–104) have not been reported. The opinion of the circuit court of appeals (R. 108–113) is reported in 153 F. 2d 196.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 18, 1946 (R. 113). A petition for rehearing was denied on February 18, 1946 (R. 118). The petition for a writ of certiorari was filed on May 4, 1946. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's dredgeworkers are employed as seamen within the meaning of the exemption provided by Section 13 (a) (3) of the Fair Labor Standards Act.

STATUTE INVOLVED

Section 13 (a) (3) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201) provides that

> The provisions of sections 6 and 7 shall not apply with respect to * * * (3) any employee employed as a seaman * * *.

STATEMENT

Petitioner, a Texas corporation, dredges oyster shell from reefs in Galveston Bay and from the marshes of southern Louisiana which it sells to customers engaged in the production of goods for commerce (R. 8, 16, 101). In this work, petitioner operates dredge boats, barges, tugs, and other equipment (R. 101). The employees of the dredge boats, who are involved in this action, normally consist of a captain, three levermen, a chief engineer and three assistants, three loaders, six deckhands, two oilers and two cooks (R. 11). These employees work in two shifts, are on duty

12 hours a day and 24 days a month, and usually have three days shore leave at the end of each two-week period (R. 11).

The sole function of the dredges is to dig shell from the ocean floor and to dump the excavated shell into barges (R. 10, 64). The dredges have no motive power of their own and must be towed by a tugboat from job site to job site or from port to port (R. 12, 13, 92). They have no rudders or steering gear of any kind (R. 92–93). They remain at the dredge site continuously for months at a time and are towed to port only on rare occasions to protect them from storms (R. 91–92). After the dredge has been towed to the job site, a postlike metal cylinder on the back of the dredge, known as a spud, is lowered, and anchors are placed out at points to the right and left of the dredge (R. 12). A barge is towed alongside and fastened with ropes or steel cables (R. 12). The ladder carrying the cutting machinery and suction pipe is lowered and operations are begun (R. 12). The cutters loosen the deposit which is carried through the suction pipe (R. 12–13). Mud and some of the water are removed at a screen, and the shell is carried through a spout directly onto the barge (R. 12–13). From time to time, in order to distribute the shell load evenly, the barge is shifted by means of a cable and power-

driven winch drum, operated by the leverman (R. 13).

During the dredging operations, the captain has charge of the dredge and of all employees except the engineers (R. 56). The levermen operate the levers which control the machinery used in dredging operations (R. 56). The chief engineer, assistant engineers and oilers operate and maintain the dredging machinery and equipment (R. 56, 58). The loaders attend to the proper loading of the barges (R. 58–49). The cooks prepare the meals, wash dishes, and keep the galley clean (R. 88). The work of the deckhands is in the nature of common labor (R. 65, 66). They keep the dredge deck clean, adjust the lines in the movement of the barges during dredging operations, help pump water out of the barges while they are being loaded, and perform general work about the dredge as directed (R. 58). Infrequently they assist in switching barges, and, when the dredge is shut down, they spend their time scraping and painting (R. 63). None of the dredge employees have licenses as marine officers or sign articles as seamen (R. 15, 109).

In a suit brought by the Administrator of the Wage and Hour Division of the Department of Labor, to enjoin the petitioner from violating the Fair Labor Standards Act with respect to its dredgemen (R. 1–4, 50), the district court denied relief (R. 102–105). The circuit court of appeals reversed, holding that these employees are engaged

in "the mining and handling of shells as an industrial operation carried on by means of a floating mining plant," that their "dominant employment" is clearly "industrial" and their "maritime work" is only "incidental and occasional, taking but a small fraction of the work time" and that they "are principally employed not as seamen but as shell miners." It concluded, therefore, that they are not exempt under the provisions of Section 13 (a) (3) of the Fair Labor Standards Act (R. 112).

ARGUMENT

1. In denying the "seaman" exemption to petitioner's employees, the court below properly held that Section 13 (a) (3) was not intended to apply to employees whose predominant duties were not those of seamen. The same view has been taken by the three other circuit courts of appeals which have considered the question. *Walling* v. *Bay State Dredging & Contracting Co.*, 149 F. 2d 346 (C. C. A. 1), certiorari denied, No. 413, this Term; *Walling* v. *Great Lakes Dredge & Dock Co.*, 149 F. 2d 9 (C. C. A. 7), certiorari denied, No. 412, this Term; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971 (C. C. A. 2), certiorari denied, No. 121, this Term. The *Bay State* and *Great Lakes* cases involved dredge workers and facts much the same as those in the instant case. The *Anderson* case dealt with employees on lighters whose principal duties related to trans-

ferring cargo. In all three cases, the non-nautical nature of the employees' principal duties as well as the legislative history of the exemption were stressed as grounds for denying the exemption.

These decisions and the decision below are also in accord with the Administrator's interpretation that the phrase "employed as a seaman", as used in Section 13 (a) (3), refers to one who performs aboard a vessel "service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character" and that "employees on floating equipment * * * engaged in dredging operations or in the digging or processing of sand, gravel, or other materials are not employed as 'seamen.'" See Interpretative Bulletin No. 11, July 1939, revised July 1943, paragraphs 3, 5.[1] This construction of Section 13 (a) (3), which excludes those whose duties do not relate principally to marine transportation, embraces all maritime workers whom Congress intended to exempt.[2] And

[1] The pertinent sections of the bulletin are printed in the Appendix, *infra*, pp. 10–13.

[2] A more elaborate discussion of the legislative history indicating the Congressional intent may be found in the briefs and memorandum filed by the Administrator in *Great Lakes Dredge & Dock Co.* v. *Walling*, No. 412, this Term, certiorari denied, November 5, 1945; *Bay State Dredging & Contracting Co.* v. *Walling*, No. 413, this Term, certiorari denied, November 5, 1945; and *Manhattan Lighterage Corp.* v. *Anderson*, No. 121, this Term, certiorari denied, October 8, 1945.

the fact that it is the principal occupation that is controlling suffices to explain the reasoning of the court below, characterized by petitioner as internally inconsistent (Pet. 10).

The decision below, in the same manner as the other circuit court of appeals decisions and the Administrator's interpretative bulletin, also gives effect to the wholesome rule that exemptions to the Fair Labor Standards Act are to be strictly construed. *Phillips* v. *Walling,* 324 U. S. 490.

2. Notwithstanding the unanimity of opinion of the four circuit courts of appeals that have decided the question in issue, petitioner suggests the existence of a conflict among the circuits (Pet. 8). But the only federal appellate decision under the Fair Labor Standards Act which petitioner specifically intimates is in conflict with the decision below is *Gale* v. *Union Bag & Paper Corp.,* 116 F. 2d 27 (C. C. A. 5), certiorari denied, 313 U. S. 559. Pet. 7, note 16. This case was decided by the very court that decided the instant case, and therefore cannot be said to present a conflict in the circuits even if the result is diametrically opposed to that reached here. The two decisions, however, are not in conflict. The duties of the barge tenders in the *Gale* case, unlike those of the dredge workers here, were primarily, if not exclusively, related to the operation and navigation of barges as means of water trans-

portation. The Administrator has recognized the applicability of the "seaman" exemption to barge tenders performing the normal duties "necessary and usual to the navigation of barges * * * unless they do a substantial amount of nonexempt work." See Interpretative Bulletin No. 11, as revised July 1943, paragraph 6, *infra*, p. 12.

Petitioner also relies upon decisions under other statutes. But decisions holding dredge workers to be seamen for other purposes cannot be considered in conflict with the decision below. The meaning of the term "seaman" for the "purpose of a particular statute * * * must be read in the light of the mischief to be corrected and the end to be attained." *Warner* v. *Goltra*, 293 U. S. 155, 158. See also *Norton* v. *Warner Co.*, 321 U. S. 565, 570–572; *South Chicago Co.* v. *Bassett*, 309 U. S. 251. In *Walling* v. *Bay State Dredging & Contracting Co., supra*, the court observed that "as ordinarily used, the word 'seamen' would not include dredge-workers." 149 F. 2d at 348. A more liberal interpretation of the term, adopted to give broad scope to other remedial statutes, should not be assimilated into an exemptive provision of the Fair Labor Standards Act so as to narrow that Act's coverage.

CONCLUSION

The decision of the court below is correct and is in accord with the conclusions of all the circuit

courts of appeals that have passed upon the question. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

WILLIAM S. TYSON,
Solicitor,

MORTON LIFTIN,
Assistant Solicitor,

JOSEPH M. STONE,
Attorney,
U. S. Department of Labor.

JUNE 1946.

APPENDIX

Interpretative Bulletin No. 11—Seamen Exemption

THE SCOPE AND APPLICABILITY OF THE EXEMPTION PROVIDED BY SECTION 13 (A) (3) OF THE FAIR LABOR STANDARDS ACT OF 1938. JULY 1943.[1] UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS. OFFICE OF THE ADMINISTRATOR

1. Section 13 (a) (3) of the Act provides an exemption from the minimum wage provisions of section 6 and the maximum hours provisions of section 7, as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed as a seaman * * *.

2. The provisions of sections 6 and 7 of the act apply only to "employees * * * engaged in (interstate) commerce or in the production of goods for (interstate) commerce." See Interpretative Bulletins Nos. 1 and 5. This bulletin will not deal with the question as to which "seamen" are so engaged, but will be directed solely to the scope of the exemption in section 13 (a) (3). This bulletin is intended to indicate the construction of this section which will guide the Administrator in the performance of his administrative duties unless directed otherwise by the au-

[1] Originally issued July 1939. Paragraph 6 revised July 1943.

thoritative ruling of the courts, or unless he shall subsequently decide that his prior interpretation is incorrect.

3. An employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. In our opinion, this exemption extends to employees performing such service on vessels navigating inland waters as well as on ocean-going and coastwise vessels.

4. The exemption extends to members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in the preceding paragraph. However, concessionaires and their employees aboard a vessel ordinarily do not perform service subject to the authority, direction, and control of the master of the vessel except incidentally and do not come within the exemption under discussion.

5. The exemption does not extend to employees working aboard vessels whose service is not rendered primarily as an aid in the operation of the vessel as a means of transportation. Thus employees on floating equipment who are engaged in the construction of docks, levees, revetments, or other structures, and employees engaged in dredging operations or in the digging or processing of sand, gravel, or other materials are not employed as "seamen." For the same and other reasons,

stevedores and longshoremen are not regarded as "seamen." Similarly, stevedores or roustabouts traveling aboard a vessel from port to port whose principal duties require them to load and unload the vessel in port would not themselves come within the exemption even though during the voyage they may perform from time to time certain services of the same type as those rendered by other employees who would be regarded as seamen under the act. However, an employee employed as a seaman would not be outside the exemption simply because, as an incident to that employment, he assists in the loading or unloading of baggage or freight at the beginning or end of a voyage.

6. Barge tenders on non-self-propelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lines, pumping out bilge water, and other similar activities necessary and usual to the navigation of barges, are considered seamen within this exemption unless they do a substantial amount of nonexempt work. Loading and unloading and activities relative thereto will be considered nonexempt work. Employees on seagoing barges would also seem to be employed as seamen.

7. Various situations are presented with respect to employees rendering watchman or similar service aboard a vessel in port. Where such services are rendered by members of the crew during a temporary stay in port or during a brief lay-up for minor repairs such employees would be within the exemption. Where the vessel is laid up for a considerable period members of the crew rendering watchman or similar service aboard the

vessel would not appear to be within the exemption because their services are not rendered primarily as an aid in the operation of the vessel as a means of transportation. Furthermore, employees who are furnished by independent contractors to perform watchman or similar service aboard a vessel while in port would not be employed as "seamen," regardless of the period of time the vessel is in port, since their services are not of the type described in paragraph 3 above. The same considerations would apply in the case of a temporary or skeleton crew hired to maintain the vessel while in port so that the regular crew may be granted shore leave.

8. Section 13 (a) (5), which provides an exemption from both the wage-and-hour provisions for employees engaged in certain operations in the sea-food and fishery industry, is discussed in Interpretative Bulletin No. 12. In addition, attention is directed to section 13 (b) (2) of the act, which provides an exemption from the maximum hour provisions for "any employee of an employer subject to the provisions of part I of the Interstate Commerce Act."

U. S. GOVERNMENT PRINTING OFFICE: 1940